

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION**

**MIKE FORADORI, as Guardian for the
Person and Estate of MICHAEL FORADORI, JR.,
A Minor, and LANE FURNITURE INDUSTRIES, INC.**

PLAINTIFFS

VS.

CIVIL ACTION NO. 1:03CV669-MD

CAPTAIN D'S, LLC

**DEFENDANT/
THIRD PARTY PLAINTIFF**

VS.

**CASTLES & ASSOCIATES, P.A.,
JIM WALTER HOMES, INC., JOHN DOES 1-10,
and XYZ CORPORATIONS 1-10**

THIRD PARTY DEFENDANTS

JIM WALTER HOMES, INC.'S MOTION FOR SUMMARY JUDGMENT

COMES NOW Third Party Defendant, Jim Walter Homes, Inc., ("Jim Walter") by and through counsel, in the above styled and numbered cause of action, and pursuant to Rule 56 of the Federal Rules of Civil Procedure, files this its Motion for Summary Judgment on the basis that there is no genuine issue as to any material fact, and thus Third Party Defendant Jim Walter Homes, Inc. is entitled to judgment as a matter of law with respect to the claims of Captain D's, LLC against it. As grounds for this Motion, Jim Walter Homes, Inc. would show unto the Court as follows:

1. Jim Walter Homes, Inc. was not negligent in any respect toward Plaintiff Foradori, as Foradori was no more than a trespasser on Jim Walter Homes, Inc.'s premises at the time of his injury, and Jim Walter Homes, Inc. did not breach its duty to not willfully or wantonly injure Foradori. Further, the actions or inactions of Jim Walter Homes, Inc. were not the proximate cause of Foradori's injuries, as the intervening criminal act of Captain D's employee, Gary Harris, was the sole proximate cause of Foradori's injuries.

2. Since Jim Walter Homes, Inc. did not breach any duty owed to Plaintiff Foradori and was thus not negligent in any respect, Captain D's is not entitled to indemnity from Jim Walter Homes, Inc. Moreover, Captain D's was actively negligent and Jim Walter Homes, Inc., if negligent at all, was only passively negligent, precluding Captain D's claim for indemnity.

This Motion is supported by the following documents, copies of which are attached hereto and fully incorporated into said Motion by reference:

- (1) Amended Complaint of Foradori (Exhibit A),
- (2) Answer of Captain D's LLC to Amended Complaint (Exhibit B),
- (3) Third Party Complaint of Captain D's LLC (Exhibit C),
- (4) Answer of Jim Walter Homes, Inc. to Third Party Complaint (Exhibit D),
- (5) Affidavit of Thomas Allen and survey of Jim Walter Property prepared by Pritchard Engineering, Inc. (Exhibit E),
- (6) Excerpts from the deposition of Jim Johnson pp. 6, 13-14 (Exhibit F),
- (7) (Exhibit G) (intentionally omitted)
- (8) Affidavit of Roy Stark and survey of Jim Walter property (Exhibit H),
- (9) (Exhibit I) (intentionally omitted)
- (10) Deposition of Michael D. Foradori, Jr., pp. 21-22, 26-27, 34 (Exhibit J),
- (11) Photographs of retaining wall taken by Captain D's and plaintiff (Exhibit K),
- (12) Affidavit of Larry Britt (Exhibit L), and
- (13) Excerpts from the deposition of Buddy McCarty pp.11-14 & 24-26 (Exhibit M).
- (14) Memorandum Brief in Support of Motion for Summary Judgment (Exhibit N).

WHEREFORE PREMISES CONSIDERED, Third Party Defendant Jim Walter Homes, Inc. files this Motion for Summary Judgment and requests the Court to enter an Order dismissing

Captain D's LLC's Third Party Complaint against it and granting Third Party Defendant Jim Walter Homes, Inc. judgment as a matter of law.

RESPECTFULLY SUBMITTED, this the 6th day of July, 2005.

JIM WALTER HOMES, INC.,
Third Party Defendant

By: /s/Tacey Clark Clayton
TACEY CLARK CLAYTON (MSB #8472)
WILLIAM H. DAVIS, JR. (MSB #10656)
Attorneys For Jim Walter Homes, Inc.

OF COUNSEL:

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CERTIFICATE OF SERVICE

I, Tacey Clark Clayton, attorney for Third Party Defendant Jim Walter Homes, Inc., do hereby certify that I have this day electronically filed the foregoing Motion for Summary Judgment with the Clerk of the Court using the ECF system, which sent notification of such filing to the following:

Robert H. Burress, III, Esq., *Counsel for Michael Foradori, Jr.*
D. Zachary Scruggs, Esq., *Co-Counsel for Michael Foradori, Jr.*
L. Bradley Dillard, Esq., *Counsel for Captain D's, LLC*
Bradley F. Hathaway, Esq., *Co-Counsel for Captain D's, LLC*
Kevin B. Smith, Esq., *Co-Counsel for Captain D's, LLC*
Taylor B. Smith, Esq., *Counsel for Lane Furniture Industries, Inc.*
Elizabeth Pugh Odom, Esq., *Co-Counsel for Lane Furniture Industries, Inc.*
Brad Best, Esq., *Co-Counsel for Williams Engineering, Inc.*
Michael Noel Watts, Esq., *Co-Counsel for Williams Engineering, Inc.*

I further certify that I have mailed by United States Postal Mail the document to the following non-ECF participants:

Jana Long Dawson, Esq.
James Mark Shelton, Esq.
Shelton & Dawson, PA
P.O. Box 228
Tupelo, MS 38802
Counsel for Castle & Associates, P.A.

This the 6th day of July, 2005.

/s/Tacey Clark Clayton
TACEY CLARK CLAYTON